KU PON & ORS

v.

PEMANDANGAN SINAR SDN BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: MT1 22-256-1998]
24 JUNE 2004

TORT: *Negligence - Duty of care - Whether notional duty of care existed between plaintiffs and defendants - Forseeability of injury to plaintiffs - Relationship of proximity - Chain of causation - Whether just to impose liability of negligence on defendants*

TORT: *Negligence - Breach of confidence - Whether defendants owed duty of confidence to plaintiffs - Whether there was quality of confidentiality to information received by defendants - Criminal Procedure Code, s. 13*

This was the plaintiffs' claim against the defendants for damages and losses resulting from the publication of an inaccurate and untrue article regarding certain family members of the plaintiffs who were kidnapped. The plaintiffs had asserted that the three defendants had acted negligently and in breach of their responsibility to preserve the plaintiffs' family when they had written, edited and published inaccurate facts in the daily edition of the Sin Chew Jit Poh on 25 August 1996. The plaintiffs contended that since the publication was meant for the public's consumption, the defendants had created a special relationship of responsibility for the plaintiffs' safety that they breached when they published the inaccurate article. The plaintiffs also submitted, in the alternative, that the defendants had committed a breach of confidence by exploiting the facts of the kidnapping and publishing them without the plaintiffs' prior permission. The plaintiffs averred that the kidnappers had demanded additional ransom money of RM3 million as a consequence of the publication, and as the plaintiffs were unable to raise that sum, the victims had not been released. Furthermore, the kidnappers had refused to pursue further negotiations with the plaintiffs thus depriving the plaintiffs' family of the companionship of the kidnapped victims.

Held (dismissing the claim):

[1] No reasonable man could have foreseen that the plaintiffs would be injured (which had not been established here) by such run of the mill reporting in the local vernacular. In the current case, even if the plaintiffs had suffered actionable injury, the foreseeability of that injury as a result of the article was a mere possibility only and not a high probability or highly likely. It was also overwhelmingly obvious that the plaintiffs had failed to establish the relationship of proximity between the plaintiffs and the defendants, be it physical, circumstantial or causal. There was a break in the chain of causation from the defendants' zone of responsibility to that of the victims', let alone the plaintiffs' stage, by the proactive acts of the kidnappers. In the circumstances of the case, there was no justification as to why the defendants should be faulted for the injury, if any, suffered by the plaintiffs. (pp 477 a, d-e & 478 e)

[1a] The plaintiffs had failed to establish the factors of forseeability and proximity, and whether it would be fair, just and reasonable to impose liability of negligence on the defendants. The plaintiffs had been unsuccessful in establishing the necessary notional level of duty. Thus, there was no necessity to proceed further and consider whether there existed a factual duty of care. (p 479 f)

[2] In respect of the other alleged cause of action *ie*, breach of confidence, the plaintiffs never pleaded that they had supplied the information to the defendants, let alone on a confidential basis. On that premise, the issue of whether the defendants receiving the information was or should have been aware of the confidentiality of the information did not arise, hence exonerating them of any duty of confidence to the plaintiffs. (pp 479 h & 480 a)

[2a] As s. 13 of the Criminal Procedure Code makes it mandatory to report the crime of kidnapping, there was no quality of confidentiality on the information received by the defendants from any source. Therefore, the plaintiff's claim on the face of the pleadings must be struck out and dismissed with costs for want of reasonable cause of action. (p 480 f)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers [2000] 2 CLJ 457 CA ***(refd)***

Ancell v. Mc Dermott [1993] 4 All ER 355 ***(refd)***

Balden v. Shorter [1933] 1 Ch 427 ***(refd)***

Bandar Builder Sdn Bhd v. United Malayan Banking Corporation [1993] 4 CLJ 7 SC ***(refd)***

Caparo Industries plc v. Dickman [1990] 2 AC 605 ***(refd)***

Coco v. AN Clark (Engineers) Ltd [1969] RPC 41 ***(refd)***

Donoghue v. Stevenson [1932] AC 562 ***(refd)***

Electro Cad Australia Pty Ltd v. Mejati RCS Sdn Bhd [1998] 3 CLJ Supp 196 HC ***(refd)***

Governors of Peabody Donation Fund v. Sir Linsay Parkinson & Co Ltd [1985] AC 210 ***(refd)***

Grant v. Australian Knitting Mills Ltd [1936] AC 85 ***(refd)***

Guay v. Sun Publishing Co Ltd [1952] 2 DLR 479 ***(refd)***

Hedley Byrne & Co Ltd v. Heller & Partner Ltd [1964] AC 465 ***(refd)***

Honan Plantation Sdn Bhd v. Kerajaan Johor & Anor [1998] 3 CLJ 253 CA ***(refd)***

Initial Services Ltd v. Putterill [1968] 1 QB 396 ***(refd)***

Liesbosch Dredger v. SS Edison [1933] AC 449 ***(refd)***

Mc Donald's Corp & Anor v. Steel & Anor [1995] 3 All ER 615 ***(refd)***

Paul Law Ung Hua & Anor v. Hong Wei Organisations Sdn Bhd [1996] 4 MLJ 489 ***(refd)***

Pilba Trading & Agency v. South East Asia Insurance Bhd [1998] 8 CLJ 403 HC ***(refd)***

Shapiro v. La Morta [1924] 40 TLR 201 ***(refd)***

Smith v. Littlewoods Organisation Ltd [1987] 1 All ER 710 ***(refd)***

Sutherland Shire Council v. Heyman [1985] 60 ALR 1 ***(refd)***

Tractors Malaysia Bhd v Tio Chee Heng [1975] 2 MLJ 1 ***(refd)***

Yuen Kun-yue v. AG of Hong Kong [1987] 2 All ER 705 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 13

Rules of the High Court 1980, O. 18 r. 19(1)(a)

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, Reissue 1996, vol 8(1), para 416

Malaysian Court Practice, vol 1, p 507

Sir Jack Jacob & Ian S Goldrein, *Pleadings: Principles and Practice*, p 488

For the plaintiff - Frida Krishnan (Lalitha Nagamuthu); M/s Shafee & Co
For the defendant - Mubashir Mansur (Tan Joon Ho); M/s Skrine

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar J:

The first defendant is a company incorporated in Malaysia that owns Sin Chew Jit Poh (a local Chinese newspaper), whilst the second and third defendants are respectively the editor and scriptwriter of the latter newspaper. On 25 August 1996 with the participation of the second and third defendants, that newspaper had carried the headlines, "Case of a kidnapped mother and child released after a large ransom having been paid by a rich businessman from Segamat" The article in brief and loosely interpreted, carried the story in the following manner:

> The victims of a kidnapping, which occurred the 12th of this month in Segamat, being the wife and son of a car dealer-cum-housing developer, have been released in two stages, after a large ransom was paid by their family.
>
> This dramatic incident which had shocked Segamat, took place at about 3.00 a.m. on the 12th of this month, when three robbers armed with pistols had broken into the house of Khoo Kong Bun, a car dealer-cum-housing developer from Segamat. By force they had abducted Mrs. Gan (60 years of age), the wife of Mr. Khoo and the son (35 years of age), with Mr Khoo Kong Bun left behind gagged in the house.
>
> The robbers had left the house by car. After the kidnapping of the mother and son, the kidnappers were reported to have contacted the family and had demanded RM5 million as ransom. According to a source, the kidnappers had resorted to psychological warfare by not contacting the family for a few days.
>
> The victim family was known not to have made any police report for fear of the safety of the victims. The police when contacted of the incident, had preferred to remain quiet, and had in fact sought confirmation from the reporters whether the story of the kidnapping was true or otherwise. Regardless of that, a special unit from the Headquarters stationed at Bukit Aman Kuala Lumpur, had been dispatched to Segamat to help a special unit already set up there, meant to deal with that sensational kidnapping.
>
> According to a source, the kidnappers had resorted to the tactics of "confuse the east when attacking the west", and in the process had contacted the victims' family from, several locations, in the like of Johore Bahru, Kuantan and Melaka when negotiating the ransom sum. The same source had also revealed that the victims' family had made two payments, with the wife of Khoo Kong Bun being released first, followed by Khoo Tien Hock after the staggered payments had been made.

> Up to now the amount of the ransom still remains a mystery ... According to a police source in Kuala Lumpur, the mother and son had been released a few days later. The family of the victim had paid the ransom outside Kuala Lumpur, with the victims currently not in Kuala Lumpur. They are also not in their residence in Segamat.

The plaintiffs, who are family members of the current case, had alleged that the above story carried several facts that were either inaccurate or simply not true, amongst them, being that:

1. Mrs. Gan and Khoo Tien Hock had been released;
2. the kidnappers had demanded a ransom of RM5,000,000;
3. the plaintiffs' family had not reported the kidnapping to the police;
4. when contacted the police had denied knowing the incident;
5. the family had made two separate payments, the first being for the release of Mrs. Gan and the second for Khoo Tien Hock; and
6. according to police sources, both Mrs. Gan and Khoo Tien Hock had been released and were residing overseas.

The plaintiffs had asserted that the three defendants had acted negligently, and in breach of their responsibility to preserve the plaintiffs' family, when they had written, edited and published inaccurate facts or untruths in the daily edition of the Sin Chew Jit Poh on 25 August 1996. The particulars of the negligence were that, as the publication was meant for the public's consumption, the defendants had created a special relationship, whereby they were thus responsible for the safety of the plaintiffs. Unfortunately, the defendants had breached it when they had published the inaccurate article. Further, the defendants had failed in their duty when they had failed to obtain the correct information, or had them verified first, after obtaining the information from their sources prior to the publication. By so failing that duty the plaintiffs had suffered damages and losses.

The plaintiffs had ventilated that as a consequence of the inaccurate reporting, editing and publication by the respective defendants, the kidnappers had demanded an additional RM3,000,000. As the plaintiffs were unable to raise that additional sum, the victims were not released, even to-date. Furthermore, due to the inaccuracy of the contents, the kidnappers had refused to pursue further negotiations with the plaintiffs, hence depriving the plaintiffs' family of the companionship of the kidnapped victims.

Apart from the allegation of negligence, the plaintiffs in the alternative had pleaded that by so publishing the inaccurate article, the defendants had breached the confidence of the plaintiffs. The plaintiffs had submitted that as the defendants were in the know of the facts of the kidnapping, they were thus duty bound to keep them secret. In fact, the plaintiffs had alleged that the publication of the facts was made without their prior permission. By so exploiting the facts of the kidnapping, and having published them without prior permission, the plaintiffs had suffered damages and losses.

Founded on the antecedents and factual matrix of the case, all three defendants had separately filed their respective applications, to strike out the writ pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980. Unfortunately the first and third defendants had failed before the senior assistant registrar, resulting in a notice of appeal being filed against that decision (encl. 15). The second defendant on the other hand fared differently before a different senior assistant registrar, when he managed to successfully convince the court, resulting in the writ being struck out. The plaintiff being dissatisfied with that pronouncement had filed a notice of appeal to the judge in chambers (encl. 23).

When the matter came up before me, both parties had agreed that both enclosures *viz*. 15 and 23, be heard together as they involved identical issues of fact and law. The decision would bind both enclosures.

Regardless of the simplicity of the facts, encapsulated in them are complex legal issues, which cannot be avoided but must be discussed by the court, starting with the established legal principles of striking out. The power of striking out under O. 18 r. 19 of the RHC 1980 of any pleading is not mandatory but permissive, as discretion is given to the judge to act on it, dependant upon all the facts before him (*Halsbury's Laws of England*, vol. 37, 4th edn; *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation* [1993] 4 CLJ 7). To avoid rigidity in its approach, a court must apply reasonable latitude before arriving at some harsh decision, as the powers to dismiss an action summarily is coercive, drastic and draconian in operation (*Pleadings: Principles and Practice* by Sir Jack Jacob and Ian S. Goldrein p. 488; *Tractors Malaysia Bhd v. Tio Chee Heng* [1975] 2 MLJ 1; *Mc Donald's Corp and Another v. Steel & Anor* [1995] 3 All ER 615). That being so a court thus must exercise it with the greatest of care and circumspection, and naturally only in the clearest of cases.

The *Malaysian Court Practice*, vol. 1 at p. 507 had authored:

> "A summary procedure under this rule should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. The root word is not "unsustainable" but rather 'obviously' which denotes that in the face of it, the claim must be plainly or evidently unsustainable in law: *Pet Far Eastern (M) Sdn v. Tay Young Huat & Ors* [1999] 2 CLJ 886." ... Pleadings must be hopeless, baseless or without foundation in law or in equity, or must be an abuse of the process of the court before they can be struck out under this rule.

In *Honan Plantation Sdn Bhd v. Kerajaan Johor & Anor* [1998] 3 CLJ 253 under holding (1) it was stated:

> In essence, the principle is that pleadings ought not to be struck out save in plain and obvious cases.

In a nutshell, this summary procedure under the impugned O. 18 r. 19(1)(a) Rules of the High Court 1980 may be adopted when it can clearly be established that the action on the face of the pleadings is obviously unsustainable, it being too plain for comfort. The test is "on the face of the pleadings", which invariably means that no external evidence shall be admissible, with the facts in the pleadings to be the sole determinant, and only source of supply of evidence. For purposes of the current case, the court can only look at the impugned statement of claim, and disregard any evidence supplied through affidavits let alone from the bar table (*Abdul Rahim bin Abdul Hamid & 4 Ors v. Perdana Merchant Bankers* [2000] 2 CLJ 457). In *Paul Law Ung Hua & Anor v. Hong Wei Organisations Sdn Bhd* [1996] 4 MLJ 489 Abdul Kadir J had succinctly reiterated that no evidence shall be admissible, with the pleadings being the only source whether a cause of action existed.

The plaintiffs had contended that there existed a duty of care owed by the defendants to the plaintiffs, or alternatively there was a breach of confidence arising out of the said article. It was encumbent upon the defendants to ensure that the nature, quality and content of the information were accurate and true, as that publication affected the plaintiffs' family. As the plaintiffs' family safety was at stake, the defendants thus owed a duty to the former. On the point of law the plaintiffs had ventilated that a duty of care would exist if it were foreseeable that someone could be injured by the action of the defendants.

I had to start off with the accepted legal principle that the pleadings and particulars supplied must be presumed to be true, unless too bizarre to be accepted by any reasonable person. Mercifully the defendants had acquiesced to the latter principle, and had primarily focused on the poser of want of cause of action in the pleadings, as there was a dearth of it in the statement of claim. The plaintiffs in response had argued strenuously that the triable issues in this action, formulated in question like manner, did exist and they were, amongst others:

1. whether there was a duty of care owed by the defendants to the plaintiffs;
2. if so, was this duty breached;
3. whether there was any damages or losses suffered as a result of this breach;
4. whether the losses were foreseeable and proximate;
5. whether there was a breach of confidence arising out of the publication of the said article;
6. whether the information was confidential in nature;
7. whether the defendants were entitled to the relevant information;
8. whether it was in the interest of the public to print such information; and
9. whether the defendants were negligent in their handling of the information?

The issue of want of cause of action, whether I could conclude that the plaintiffs' claim fell within any legally recognized heads of claim for negligence, certainly had to be founded only on the facts pleaded in the statement of claim, which as said earlier must be presumed to be true at this early stage. To succeed, the plaintiffs must by legal necessity establish the existence of a duty of care towards them. Further, the plaintiffs must establish whether the alleged negligence pursuant to the publication had caused provable physical damages or losses, or economic losses arising from that physical damage or economic loss, which by necessity must fall within the scope of that duty of care.

As regards the evidence of loss and damages, the plaintiffs had submitted and posed the question in this manner, "In the present action, was it not foreseeable that a misreporting of the events which occurred could result in injuries being inflicted on the plaintiffs if the kidnap victims were

harmed?" Regardless of those strong and emotive words, the plaintiffs could not, either during the submission or in the pleadings, categorically confirm orally, or identify anywhere in the pleadings that anyone had been hurt, killed or the kidnapped victims had merely refused to return to their families, or were now residing overseas but on the quiet. If the plaintiffs could not establish any of those sensational evidential statements, except that the victims were not in their residences (for some reason which the plaintiffs could not explain), how then were they to successfully establish that the victims' non-presence was connected directly or indirectly to the offending article? How then were the actionable damages and loss to be proved? A cursory reading would reveal that the damages sought for was dependant on that speculative "could" and "if".

To appreciate the plaintiffs' arguments better, I herewith reproduce verbatim the relevant portion of the submissions of the plaintiffs:

> It is trite law that a duty of care would exist if it is foreseeable that someone could be injured by the action of the defendants. In the present action, was it not foreseeable that a misreporting of the events, which occurred could result in injuries being inflicted on the plaintiffs if the kidnap victims were harmed? The respondent respectfully submits that the answer is in the affirmative. There was in existence therefore a duty of care. This duty of care was clearly breached by the defendants in publishing the report as in the manner they did, what more with all the inaccuracies and untruths in the relevant article.

A perusal of the plaintiffs' submission will point to the direction that, merely on the ground of it being foreseeable and someone could be injured by the action of the defendants, a duty of care thus would exist. Surely this form of approach is unacceptable, as, much as foreseeability of harm is one of the necessary ingredients before a duty of care can exist, it alone is not sufficient to impose a duty of care (*Yuen Kun-yue v. AG of Hong Kong* [1987] 2 All ER 705 (710). The plaintiffs went further to suggest and stress that, if a misreporting of the events could result in injuries being inflicted on the victims, but without actually proving that harm, that was sufficient to establish a duty of care. The concept of "could", which would encompass, *inter alia,* likelihood and possibilities would put a heavy burden on the court, as likelihood and possibilities are ad infinitum, as eg, with one possibility leading to another. For practical reason and common sense, the submission of importing the concept of "could" as mooted by the plaintiffs, within the purview of the tort of negligence must by necessity be rejected. To wind up this poser, Lord Wright in *Liesbosch Dredger v. SS Edison* [1933] AC 449 at 460 had occasion to state:

> The law cannot take account of everything that follows from a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause or causes,' or consequence of consequences.

Advancing from the above view, this precept of "duty of care", which has its source from the tort of negligence, requires some sustenance of damage, as it encompasses the imposition of a duty not to inflict damage or loss carelessly, and not merely a duty not to act carelessly. If the plaintiffs here could not, or even have refused to admit damages or losses despite being pressed by the court, where then is that "damages prerequisite?" To reiterate my earlier statements, to succeed it is the duty of the plaintiffs to establish first that damages had been inflicted, secondly those damages complained of are actionable, thirdly that they as persons being owed a duty of care were the ones who suffered those damages or losses, and fourthly the defendants were the legitimate persons to be held responsible.

To fall within the list of situation, recognized as legally recognized torts of negligence, the plaintiffs here must bring the facts of this case within that situation (*Caparo Industries plc v. Dickman* [1990] 2 AC 605 (618; *Pilba Trading & Agency v. South East Asia Insurance Bhd* [1998] 8 CLJ 403; *Clerk & Lindsell on Torts,* 18th edn). A perusal of the pleadings will show that it is neither a claim for defamation nor malicious falsehood as promulgated in the Defamation Act 1957 and the Printing Presses and Publication Act 1984 respectively. Factually, and not denied by anyone that in the statement of claim, no reply of malice or an action for negligent misstatement as discussed in *Hedley Byrne & Co Ltd v. Heller & Partner Ltd* [1964] AC 465 had been filed. For the latter no claim of economic loss had been pleaded either.

A further scrutiny of the statement of claim revealed that the plaintiffs had not questioned the honesty and *bona fide* action of the defendants when publishing the article. That being so those two issues will not be discussed. Irrespective of the latter statement, in *Guay v. San Publishing Co Ltd* [1952] 2 DLR 479, the publishers got off the hook when the court held that no liability would be held against the newspaper, which negligently but in good faith had published an untrue statement which had caused shock to a reader.

As per the facts, if the defendants were merely exercising a legal right, no actionable case of negligence thus may prevail against them (*Grant v. Australian Knitting Mills Ltd* [1936] AC 85 (103). What remained for consideration therefore was the inaccurate or untrue but honest statement of the publication (see *Guay v. Sun Publishing Ltd* [1952] 4 DLR 479; *Shapiro v. La Morta* [1924] 40 TLR 201; *Balden v. Shorter* [1933] 1 Ch

427). The latter italicized phrase is certainly not a known tort, thus leaving the plaintiffs only with the hope of being successful in convincing the court to open up, and create a new "duty of care" situation. It is well known that, to regurgitate the remarks of Lord Macmillan, "the categories of negligence are never closed" (*Donoghue v. Stevenson* [1932] AC 562 (619)), and if the situation warrants it Parliament or the courts may create a new duty situation.

So, should I expand the scope to accommodate the plaintiffs' claim? To take that drastic step, I need to conclude whether, on the given set of facts, a notional duty of care could be identified, failing which the matter ends. If I were to conclude otherwise, the next step naturally would be to determine whether a factual duty of care existed between the plaintiffs and the defendants at the hearing proper stage. Needless to say, whether the pleaded set of facts disclose the existence of notional duty of care, would very much depend on the foreseeability of damages to the plaintiffs, the relationship of proximity or neighborhood notion, and that it is fair and reasonable to impose a duty of care. To reiterate only after these ingredients have been satisfied will a notional duty of care may arise. Lord Bridge when determining whether that duty of care existed in a given set of facts, in *Caparo Industries plc v. Dickman* [1990] 2 AC 605 at 617 and 618, had occasion to remark:

> What emerges is that, in addition to the **foreseeability of damage,** necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of **"proximity"** or **"neighbourhood"** and that the situation should be one in which the **court considers it is fair, just and reasonable that the law should impose a duty** of a given scope on the one party for the benefit of the other (emphasis mine).

I find it difficult to accept that even if any actionable injury or damages were suffered by the plaintiffs (and in this case not pleaded let alone identified in open court) caused by a third party, over whom the defendants have no control, could reasonably have been foreseen by them (*Smith v. Littlewoods Organisation Ltd* [1987] 1 All ER 710). In the latter case, Lord Mackay at 721 had said:

> Unless the judge can be satisfied that the result of the human action is highly probable or very likely he may have to conclude that all that the reasonable man could say was that it was a mere possibility. Unless the needle that measures the probability of a particular result flowing from the conduct of a human agent is near the top of the scale it may be hard to conclude that it has risen sufficiently from the bottom to create the duty reasonably to foresee it ...

Crudely put, no reasonable man could have foreseen that the plaintiffs would be injured (which have not been established here), by such run of the mill reporting in the local vernacular.

It is not like, say, some hypothetical contract killers on the look out for their target who is on the run, are assisted by the detailed revelations of the local newspaper of that target's whereabouts. The eventual result would be that the target would be assassinated, resulting in the hypothetical plaintiff losing his or her spouse who may also incidentally be the sole breadwinner of the family. In that scenario, any reasonable person could foresee that by the hypothetical killers being blatantly assisted by the newspaper, the hypothetical plaintiff would suffer losses, either in financial term or the companionship of the dead spouse. In the current case, the predicament of the plaintiffs is far worse, as with the dearth of actionable injury or loss suffered by them, surely it would be premature to advance and discuss the foreseeability ingredient by the court. As said earlier, even if the plaintiffs had suffered actionable injury, the foreseeability of that injury as a result of the article was a mere possibility only and not a high probability or highly likely.

Needless to say too, it was overwhelmingly obvious here that the plaintiffs had failed to establish the relationship of proximity between the plaintiffs and the defendants, be it physical, circumstantial or causal. The House of Lords as regards the ingredient of proximity, in *Governors of Peabody Donation Fund v. Sir Linsay Parkinson & Co Ltd* [1985] AC 210, had opined (p. 240):

> A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case.

Deane J in *Sutherland Shire Council v. Heyman* [1985] 60 ALR 1 (Lexis) had explained the concept of proximity as follows:

> It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship ... of professional man and client and what might (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property to another or reliance by one party upon such care being taken where the other party ought to have known of such reliance. Both the identity and relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case.

As I see it, even though admittedly the defendants were the parties that produced and published the article, it must be borne in mind that there were altogether more than four sets of responsible players on the scene, each at their respective zone. I start of with the three defendants who respectively wrote, edited and published the article (zone 1), the kidnappers who were alleged to have reacted to the contents (zone 2), the victims who have not been seen since (zone 3-and not proved harmed or dead), and lastly the plaintiffs who have not been harmed or in harm's way (zone 4). In a nutshell:

1. the defendants were not responsible directly to the injury of the victims if any, let alone the plaintiffs (not established)';
2. the injury if any, would be on the victims and not the plaintiffs;
3. the injury if any to anyone would be committed by the kidnappers;
4. the acts of the kidnappers were voluntary and independent of the defendants' fault (if any); and
5. the plaintiffs have no provable damages or losses.

In other words there was a break in the chain of causation from the defendants' zone of responsibility to that of the victims', let alone the plaintiffs' stage, by the proactive acts of the kidnappers. In the circumstances of the case, founded on the available facts, I see no justification why the defendants should be faulted for the injury suffered by the plaintiffs, if any. Lord Goff at pp. 729 and 730 in *Smith v. Littlewoods Organisation Ltd* [1987] 1 All ER 710, in similar vein had viewed:

> ... even though A is at fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do ... (that) may be read as expressing the general idea that the voluntary act of another, independent of the defendant's fault, is regarded as novus actus interveniens, which, to use the old metaphor, breaks the chain of causation ... it also expresses a general perception that we ought not to be held responsible in law for the deliberate wrongdoing of others.

I now touch on the issue whether in the circumstances of the case to create a new duty of care would be an intolerable burden on any newspapers let alone for the writers and editors or otherwise. *Clerk & Lindsell* at para. 7-06 had authored:

However powerful the arguments in favour of a duty on the particular facts of the claimant's case, they may be outweighed by counter arguments relating to the general class of relationship within which the claimant's case falls to be assessed. As Lord Browne-Wilkinson has said, with reference to the public interest aspect of the duty test:

> In English law the decision as to whether it is fair, just and reasonable to impose a liability of negligence on a particular class of would-be dependant on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered ...

To arrive at the decision as to whether it is fair, just and reasonable to impose a liability in negligence against the defendants, it is inevitable that I consider legal policy, the factor of where to draw the line so as to avoid the floodgates of litigation being unleashed, the interest of individuals who may already have the protection of statutes, factor of public awareness and deterrence against would be offenders, where the parameters of liability should stop, the factor of freedom of press which has a social and moral duty to the world at large etc. And the list goes on. After much soul searching and prognosis of the relevant facts, and having weighed all the pros and cons, I must conclude that the prerequisite of it being fair, just and reasonable to impose a duty of care here must fail (*Ancell v. Mc Dermott* [1993] 4 All ER 355; *Guay Sun Publishing Co Ltd* [1952] 2 DLR 479).

In the light of the above prognosis of the law and facts, I have no difficulty in finding that the plaintiffs had failed to establish the factors of foreseeability, proximity, and whether it will be fair, just and reasonable to impose liability of negligence on the defendants in the circumstances of the case. On that score it is my finding that the plaintiffs had unsuccessfully established the necessary notional level of duty. That being so there is thus no necessity for me to proceed further and consider whether there exists a factual duty of care.

I now discuss only briefly the other alleged cause of action ie, breach of confidence. I see no necessity to belabour on this point, as the plaintiffs never pleaded that they had supplied the information to the defendants, let alone on a confidential basis. On that premise, the issue of whether the defendants receiving the information was or should have been aware of the confidentiality of the information does not arise, hence exonerating them of

any duty of confidence towards the plaintiffs (*Coco v. A.N Clark (Engineers) Ltd* [1969] RPC 41; *Electro Cad Australia Pty Ltd v. Mejati RCS Sdn Bhd* [1998] 3 CLJ Supp 196; *Clerk & Liindsell*).

In support of the above paragraph, it is quite timely to reproduce para. 416 of *Halsbury's Laws of England,* 4th edn reissue 1996, vol. 8(1) which states:

> The confidentiality of information concerning misconduct or iniquity which in the public interest ought to be disclosed are not protected. This applies to matters relating to past and contemplated crime ... The interests of justice may require disclosure in these circumstances.

Lord Denning MR in *Initial Services Ltd v. Putterill* [1968] 1 QB 396 (405) had the opportunity also to remark:

> ... Wood, V.C put it in a vivid phrase: There is no confidence as to the disclosure of iniquity.
>
> In *Weld-Blundell v. Stephens,* Bankes LJ rather suggested that the exception is limited to the proposed or contemplated commission of a crime or a civil wrong. But I should have thought that was too limited. The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always-and this is essential-that the disclosure is justified in the public interest ... . There may be cases where the misdeeds is of such a character that the public interest may demand, or at least excuse, publication on a broader field, or even to the press.

As s. 13 of the Criminal Procedure Code makes it mandatory to report the crime of kidnapping, there is thus no quality of confidentiality on the information received by the defendants from any source. On that note, it is my finding that the plaintiffs' claim on the face of the pleadings must be struck out and dismissed with costs, for want of reasonable cause of action.